STATE OF MICHIGAN

IN THE COURT OF APPEALS

KIMBERLY CORL, Personal Representative of the ESTATE OF BRADLEY SCOTT CORL, deceased.

Plaintiff-Appellee,

Ct. of Appeals Case No. 319004
Tuscola County Case No. 11-026733-NI
Hon. Amy Grace Gierhart

v.

RAILAMERICA, INC., AND HURON AND EASTERN RAILWAY COMPANY, INC.

Defendants-Appellants.

_____/

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PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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JURISDICTIONAL STATEMENT

Plaintiff/Appellee denies that Defendants/Appellants' Application demonstrates grounds for granting leave under MCR 2.3012 (B). There is not a "substantial question" as to the validity of a legislative act. MCL 462.317 simply does not say what Defendants/Appellants would like to say, i.e. that it erases the common law duty of Michigan railroads to maintain safe track, and eliminate visual obstructions. Neither does the issue involve legal principles of major significance to the state's jurisprudence. The Court of Appeals did not overrule *Paddock v. Tuscola & Saginaw Bay Railway Co.*, 225 Mich App 526; 571 NW2d 564 (1997); it simply distguished it by properly noting that case's holding as determining that a railroad had no duty to petition a road authority to take action under MCR 462.317.

COUNTER STATEMENT OF QUESTIONS INVOLVED

I. Whether the Court of Appeals holding herein that a railroad's common law duty to prevent visual obstruction of track is unaffected by the so-called "clear vision area" statute, MCL 662.317, conflicts with the Court of Appeals decision in *Paddock v. Tuscola & Saginaw Bay Ry. Co., Inc.*, 225 Mich App 526; 571 NW2d 564 (1997);

The Court of Appeals ; NO.

Plaintiff Appellee answers: NO.

Defendants Appellants answer: YES.

II. Whether the Court of Appeals decision herein contravenes Supreme Court precedent regarding the so-called "physical facts" rule, and calls into question the Court of Appeals finding of a factual dispute regarding visual obstruction as a proximate cause.

The Court of Appeals answered: NO.

Plaintiff Appellee answers: NO.

Defendants Appellants answer: YES.

PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

Counter Statement of Facts.

This fatal truck/train collision occurred on the morning of September 29, 2009. Bradley Scott Corl was southbound on Lobdell Road in Mayville, Michigan, driving a flatbed truck owned by his employer, Hoppes Lumber. A Huron & Eastern locomotive, HESR 3866, traveling light, was eastbound, long hood forward (i.e. train traveling backwards), so that only engineer Russell Page could see Corl as he approached the crossing from the north.

Appended hereto as Ex. 1 is a diagram of the crossing, along with a Google Earth view, which demonstrate the extreme, approximate 40 degree angle made by Lobdell Road and the Huron & Eastern track to the west, i.e. the northwest quadrant of the crossing. Further, from the Google photo it is evident that the northwest quadrant is a wooded hillside. The engineer, who testified he was familiar with the crossing, confirmed that the crossing angle of the northwest quadrant was "roughly" 45 degrees and that there was a hillside on the northwest quadrant.

Q Now, this is a rather extreme angle of the crossing; correct?
A Yes.
Q Probably 45 degrees, roughly?
A Roughly.
Q Okay. And are you familiar with the rise in ground in this area (indicating), in the northwest quadrant of the crossing?
A Yes.
Q There's like a hillside almost-----
A Right.

Deposition of Russell Page, pp. 24-25, appended hereto as Ex. 2.

It is precisely this combination of topography, foliage and the extreme angle of the crossing that render it treacherous for a southbound motorist facing an eastbound train. The affidavit of William D. Berg, Professor Emeritus of Civil and Environmental Engineering at the University of Wisconsin, and one of the nation's premier crossing experts, is appended hereto as Ex. 3. Dr. Berg opines, based on his viewing the crossing, his examination of the speed tapes, photos, and testimony to date, that the "severe angle" of the crossing, the foliage and the configuration of the track, prevented decedent from seeing the train when he stopped at the stop line north of the crossing. Further, in Dr. Berg's opinion, the train did not become visible to Corl until he had proceeded south from the stop line one second prior to impact, affording him no time for evasive action. Dr. Berg states the railroad's available counter-measures would have included posting a flagman at the crossing, realigning the road at a 90 degree angle, closing the road, or installing warning devices, at least flashers, at the intersection.

There was a car stopped at the south side of the crossing, driven by Willis Johnson, with his wife Loretta, in the passenger seat. Johnson told officers that he observed Corl approach the crossing. He said he flashed his lights at Corl and saw the truck come to a stop at the crossing. He then claimed to have observed Corl lean forward "as if to pick something from the floor of the said vehicle." See Police Report appended hereto as Ex. 4. Then the truck proceeded forward into the path of the oncoming train.

Russell Page, the engineer, also testified that he saw decedent "bent over, like he was getting something off the floor…" but this testimony has to be discounted as inherently incredible, given the distance Page was from the decedent's vehicle and the towering height of the engine. See Ex. 2, p. 14 Dep. Of Russell Page.

Q All right. Now what makes you think the fellow was bending over to pick something up?

A I---I seen him laying, like he was reaching, laying down getting something off the floor or something, like something fell or maybe---I don't know what he was doing, but he was ---he was leaning over to the passenger side of the vehicle.
Q So you could see through the truck windows, you could see him, what laying over to the right side of the seat?
A Yes.
Q Like he's trying to look down the tracks?
A. No. He was laying down across the seat like he was picking something up off the floor or something. I'm not for sure if he was picking something off the floor or what he was doing, but he was laying towards that way.
Q And you're at this point several hundred feet away from him?
A Maybe a hundred feet, maybe.
Q And you could see through the truck window, and you could clearly see him reaching to his right?
A Yes.

The defendants evidently knew they had a problem with Page's testimony because they resisted discovery of the crew interviews conducted by Defendant's investigator in the immediate wake of the accident. On June 7, 2013, the Court, pursuant to Plaintiff's Motion to Compel, ordered that the notes of the crew interviews be produced. Attached as Ex. 5 hereto are the notes of Defendant's investigator's interview with Page who makes no mention of decedent bending over to the right as if to pick something up off the floor.

Matt Denome, the conductor, testified that he spoke with Willis Johnson and his wife, Loretta, at the scene and that he remembered Willis Johnson saying that decedent "was bending down to pick something up," Ex. 6, Depos. of Matt Denome, p. 15. Denome also incorporated this detail in the Company report, "But witness headed northbound said he was trying to pick something up on floor." Ex. 7. One would have to assume that Page would have mentioned this detail when first interviewed by the company claim investigator; his failure to do so indicates he adopted the observation as his own when Denome was questioning the Johnsons at the scene.

The decedent's action, in bending over to the right, as if laying over the right seat, is consistent with the behavior of a driver confronted with an extreme crossing angle to his right in

an attempting to see further up the track. Dr. Berg notes in his affidavit that Corl, in his normal seated position in the Hoppes truck at the stop mark, could see up the track to the west only 45 to 60 feet. See para. 8 of Berg Affidavit, Ex. 3 hereto. Leaning to the right, according to Dr. Berg, increased decedent's view up track to 114 feet. This is a more likely explanation of decedent's conduct in the last few moments of his life than the speculation offered by Defendant, i.e. that someone who had the presence of mind to stop at the crossing, instead of looking down the track for the approaching train, would bend over in the cab to pick something up off the floor.

Unfortunately, as Dr. Berg notes in his affidavit, as Corl proceeded south from the stop mark to get a better view of the track to the west, the train would have been visible to him for just one second before impact, allowing no time for an evasive response.

ARGUMENT

A. The Court of Appeals decision herein does not conflict with that Court's holding in *Paddock v. Tuscola & Saginaw Bay Ry. Co.*, 225 Mich App 526; 571 NW2d 564 (1997); and a railroad's common law duty to maintain a safe crossing free from visual obstruction is unaffected by MCL 662.317.

Appellants maintain that MCL 462.317 obviates a railroad's common law duty to remove vegetation or maintain clear lines of sight at as crossing. They contend that these duties now rest with the relevant road authority based on MCL 462.317(1). MCL 462.317 reads:

> Sec. 317. (1) If a road authority determines to establish a clear vision area as described in this section, the railroad and a road authority may agree in writing for clear vision areas with respect to a particular crossing. The portions of the right-of-way and property owned and controlled by the respective parties within an area to be provided for clear vision shall be considered as dedicated to the joint usage of both railroad and road authority.

(2) The acquisition of right-of-way, purchase and removal of obstructions within a clear vision area, including buildings and other artificial constructions, trees, brush, and other growths, and grading or earthwork, and including the maintenance of such conditions, shall be at the equal cost and expense of the railroad and road authority.
(3) For public, farm, bicycle, pedestrian, or other private crossings of the railroad tracks of a high speed rail corridor, state, federal, and other funds may be expended in accordance with section 301(4) for construction of access roads, purchase of real estate, purchase of private crossing easements, compensation for crossing closure, utility relocation, costs associated with improvements to traffic control devices, grade crossing closures, relocations, consolidations, and separations.

The statute is, at most, a cost sharing provision. The statute makes no reference to a railroad's common law duties regarding line of sight/visibility claims; it simply says if a road authority determines to establish a clear vision area, it may enter into an agreement with the railroad for an equal sharing of the consequent costs. The statute doesn't even say that the road authority has sole authority to determine whether a clear vision areas is needed. It just says that if the road authority so determines, there can be an agreement, joint usage of the affected property and an equal sharing of costs.

The statute makes no reference to common law remedies. A railroad's duty to provide a safe crossing has long been a fixture of this state's jurisprudence, as the Court of Appeals notes, citing *Masters v. Grand Trunk Western R.*, 13 Mich App 80, 83; 163 NW2d 661 (1968) and *Emery v. Chesapeake & O R Co,* 372 Mich 663, 673; 127 NW2d 826 (1964). Further, the duty to provide a safe crossing has long been held to include a duty to prevent visual obstruction of the track. *Martin v. Ann Arbor Railroad*, 76 Mich App 41, 46; 255 NW2d 763 (1977).

It is not easy to erase common law authority. In one of its earliest pronouncements on the issue, this state's high court held:

> Statutes are to be construed in reference to the common law, and it is never to be presumed that the legislature intended to make any innovation upon the common law any further than the case absolutely required in order to carry the act into effect.***And if the apparent meaning of the statute is opposed to well settled general principles it should be restrained or enlarged so as to conform to such general principles.***This is the only safe rule to adopt in the construction of statutes.
>
> *Wales v. Lyon*, 2 Mich 276, 282 (1851).

In resolving disputed interpretations of statutory language, the reviewing court must determine the legislative intent. *Hiltz v. Phil's Quality Market*, 417 Mich 335, 343; 337 NW2d 237 (1983). The legislature is deemed to act with an understanding of common law in existence before the legislation was enacted. *Nummer v. Treasury Dep't*, 448 Mich 534, 544; 533 NW2d 250 (1995); *Garwols v. Bankers Trust Co.*, 251 Mich 420, 424-425; 232 NW 239 (1930). Further, statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law. *Rusinek v. Schultz, Snyder & Steele Lumber Co.*, 411 Mich 502, 508; 309 NW2d 163 (1981). In other words, "where there is doubt regarding the meaning of such statute, it is to be 'given the effect which makes the least rather than the most change in the common law.'" *Energetics, Ltd. v. Whitmill*, 442 Mich 38, 51; 497 NW2d 497 (1993).

As the Court of Appeals noted at p. 5 of its majority opinion, the failure of MCL 462.317 to note what affect, if any, it has on the common law is markedly different from MCL 257.668(2) which specifically eliminated common law causes of action for failure to provide proper crossing signage in the absence of an order requiring same:

> The erection of or failure to erect, replace, or maintain a stop or yield sign or other railroad warning device, unless such devices or signs were ordered by public authority, **shall not be a basis for an action of negligence against the state transportation department, county road commissions, the railroads, or local authorities. (emphasis added)**

When the predecessor to MCL 257.668(2) was first enacted, the railroads similarly asserted that it eliminated the common law duty to provide a safe crossing. *Decker v. Norfolk & Western R.Co.,* 81 Mich App 647; 265 NW2d 785 (1978) was one of the first cases to consider this duty in light of MCL 257.615, the predecessor statute to MCL 257.668(2). *Masters v. Grand Trunk W.R.Co., supra,* 13 Mich App at 82-83, had previously held that the duty to maintain a crossing in a reasonably safe condition was not abrogated by MCL 257.615, but because of the statute, a railroad was not required to post additional warning signs, absent an administrative order. Relying on *Masters,* the *Decker* Court disapproved of an instruction offered by the railroad on the following grounds.

> In the instant case, defendant includes "advance or automatic crossing protection." This is too broad and would have had the effect of directing a verdict to defendant and abrogating defendant's duty to maintain a crossing in a reasonably safe condition. The other means available to maintain a safe crossing as mentioned in *Masters, supra*, and *Bauman v. Grand Trunk W R Co,* 376 Mich 675; 138 NW2d 285 (1965), i.e. a flagman, whistles, etc. would be considered "advance" crossing protection and the jury would be prohibited by such an instruction from considering such means of warning in determining if defendant breached its duty to maintain safe crossing.
>
> 81 Mich App at 652

Appellants reliance on *Paddock v. Tuscola & Saginaw Bay Railway Co.*, 225 Mich App 526; 571 NW2d 564 (1997) is misplaced as that case's holding was limited to whether the railroad has a duty to *petition* the road authority to act to establish a clear vision area if the road authority has failed to act. *Paddock* simply held that the railroad did not have a duty to petition the road authority to act. *Paddock* did not intimate, let alone hold, that the railroad's common law duties to maintain a safe crossing, including the duty to maintain safe lines of sight and to remove obstructions, including vegetation, were in any way affected by MCL 462.317.

Defendant basically contends that the "clear vision statute" (MCL 462.317) cited in *Paddock v. Tuscola & Saginaw Bay, supra*, provides the sole basis for a line of sight, or obstructed view claim. To the contrary, there is a well-established common law basis for relief. Vegetation/sight obstruction claims, under Michigan jurisprudence, are part of the general duty of a railroad to maintain a safe crossing, e.g. *Bauman v. Grand Trunk Western Railroad Company*, 376 Mich 675, 687; 138 NW2d 285 (1965).

The case of *Beasley v. Grand Trunk Ry. Co.*, 90 Mich App 576; 282 NW2d 401 (1979) is factually similar to the instant case and presents a good discussion of the common law basis of the line of sight/obstruction claims.

> According to a land surveyor, trees and bushes were growing within ten feet of the railroad track. The distance between decedent's front bumper to the place where he sat as driver was approximately seven feet. Therefore, it was possible for decedent to have been within about three feet from the railroad tracks before he had an unobstructed view of the oncoming train.
>
> 90 Mich App at 584

The Court of Appeals in *Beasley, supra,* found that the trial court had erroneously directed a verdict for defendant railroad.

> The court refused to consider the argument of plaintiffs' counsel that, because trees and shrubs were in the immediate vicinity of the railroad tracks, the decedent's automobile would have been only three or four feet from the tracks before decedent would have been in a position to view any oncoming train. The court rejected also plaintiff's contention that the jury could reasonably infer from these circumstances that decedent would not have the requisite reaction time and stopping distance to avoid the accident after becoming aware of the oncoming train. The trial judge held that because there was no direct testimony concerning these questions, they could not be inferred from the evidence presented at trial.
>
> 90 Mich App at 584

The Court of Appeals, in overturning the trial court's directed verdict, held that:

> Contrary to the position of the trial court, the fact that the decedent necessarily had a certain reaction time to the danger and required a certain stopping distance is one that can be legitimately inferred from the evidence.
>
> 90 Mich App at 586

Further, the Court of Appeals in *Cryderman v. Soo Line Railroad Co.*, 78 Mich App 456, 475; 260 NW2d 135 (1977) approved a jury instruction noting that the predecessor statute to MCL 462.317 (MCL 469.6,[1] virtually identical to the present statute) did not impose a mandatory obligation on the part of either railroad or public highway to enter into clear vision agreements.

> MCLA 469.6; MSA 22.766 and MCLA 469.7; MSA 22.767 provide a procedure for the elimination of visual obstructions through the entry and implementation of "clear vision area" agreements between railroad companies and public highway authorities having jurisdiction and control over roads intersected by railroad tracks. Within that statutory framework, parties entering such agreements are empowered to purchase and remove visual obstructions which lie within the clear vision areas. The purpose is to make railroad crossings safer. **The procedure does not impose a mandatory obligation on the part of railroad and public highway authorities to enter such agreements. (emphasis added).**
>
> 78 Mich App at 475

Thus, in light of the fact that the statute places no mandatory obligation on the part of either railroad or road authority to act to remove visual obstructions, logic dictates that the common law remains in the absence of a remedy. *Cryderman* also approved an instruction permitting the jury to consider the road commission's failure to enter into a "clear vision area" agreement with the railroad as constituting a breach of duty owed plaintiffs, 78 Mich App at

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[1] **Sec. 6.** Whenever the railroad company or railroad companies and the public authorities having jurisdiction over such highway shall so agree in writing in connection with the establishment of a new crossing, or the improvement of an existing crossing, that portion of the right of way and property owned and controlled by either highway or railroad authorities within the limiting area to be provided for clear vision as hereinafter described, shall be considered as dedicated to the joint usage of both highway and railroad improvements, and without charge to either party. The portion of property so included shall be maintained for clear vision, and the spotting of cars on railroad tracks, parking of automobiles on the highway, construction of buildings, signs and/or other obstructions of vision, and the growth of weeds, brush or similar obstructions shall be prohibited, controlled and maintained to such an extent as may be reasonably practicable.

475. That holding was overturned by the Supreme Court in *Scheurman et al v. Michigan Dept of Transportaion et al,* 434 Mich 619, 634; 456 NW2d 66 (1990), which held the road commission's duties extended only to the traveled portion of the roadway. Thus, MCL 662.317, indistinguishable from its predecessor, imposes no duty on railroad or road authority to enter into clear vision area agreements, and, in any event, even if the road authority, enters into such an agreement, it has no liability for the clear vision area.

The only conclusion is that MCL 462.317 is a poorly drafted, ineffective statute. It should be noted that the Railroad Code no where defines the term "clear vision area."

2. Whether the Court of Appeals decision herein contravenes Supreme Court precedent regarding the so-called "physical facts" rule, and calls into question the Court of Appeals finding of a factual dispute regarding visual obstruction as a proximate cause.

It has long been the rule of this state that a railroad's duty of due care may require it to provide warnings over and above those required by statutory law and regulations. The test is not whether the conditions were unusually dangerous, but whether what was done under the circumstances met the test of an ordinarily prudent man under the circumstances. *Ebel v. Saginaw County Board of Road Commissioners,* 386 Mich 598, 605 ; 194 NW2d 365 (1972).

Previously, the Supreme Court in *Emery v. Chesapeake & Ohio Railway Company*, *supra* 372 Mich at 663, held that the question of whether the "physical circumstances existing at the grade crossing involved in this case required defendant railroad in the exercise of ordinary care and prudence commensurate with such circumstances to provide warning devices in addition to the ordinary wooden crossbuck sign," was properly a jury question.

In *Bauman v. Grand Trunk Western Railroad Company*, supra 376 Mich at 687, again relying on *Emery,* the Supreme Court held that:

> Thus, unless no reasonable minds can disagree, it remains a jury question, in view of all the facts and circumstances, whether crossing protection, in addition to that provided by statute, is reasonably required.

The *Bauman* court struck down an instruction requested by the defense and held, at 376 Mich 684:

> Furthermore, by his quoted instruction the trial judge effectively took from the jury its exclusive right to determine whether, in light of all the facts and circumstances surrounding this business district grade crossing, reasonable prudence required the railroad to maintain devices warning motorists of its approaching trains in addition to the wooden crossbuck sign required by law and present at the crossing. This error, fatally affecting one of the key issues pleaded by plaintiff and supported by his proofs, requires reversal and remand for new trial.

Bauman, like the instant case, involved obstructed lines of sight, 376 Mich at 689.

> ...we must conclude that plaintiff's southeastward view of defendant's westbound 10-car train, traveling at 30 miles per hour as he approached the grade crossing, was blocked by a two story building...Thus when plaintiff was 100 feet from the track, his vision eastward along the track was blocked beyond 96 feet from the intersection by the building described.

In *Decker v. Norfolk and Western Railway Company, supra* 81 Mich App at 653, the court, relying upon the *Emery* case, approved the following instruction to the jury:

> I charge you, members of the jury, that the railroad's duty of due care may require it to provide warnings over and above those provided by statutory law or statutory regulations. The test is not whether the conditions were unusually dangerous, but whether what was done under the circumstances met the test of an ordinary prudent man, under the same or similar circumstances.
>
> I further charge you that compliance with the orders of the Michigan Public Service Commission is among the circumstances and certainly evidence that the jury should consider in determining whether the railroad was negligent, but compliance with the Commission's order is only one of the circumstances that the jury shall consider.
>
> The jury must consider whether in the light of all the facts and circumstances surrounding the Martz Road crossing, reasonable prudence requires the railroad, Norfolk & Western,

> to maintain devices warning the motorist of its approaching train in addition to the crossbuck signs required by law and present at the crossing.
>
> If the jury determines there was such a duty and the railroad failed to provide additional warning devices, the jury must decide whether such failure to provide additional warning devices proximately caused the accident.

In approving the above instruction, the Court of Appeals stated that one of the items of proof it relied upon was that, "…the tracks intersected at a 40-degree angle and a person had to turn their whole body to see down the track…" 81 Mich App at 656.

In the instant case, the evidence establishes that Plaintiff stopped at the crossing, and was seen to lean over to his right, over the passenger seat in the direction of the approaching train. The driver of the vehicle on the other side of the crossing inferred that was as if decedent were trying to pick something up off the floor. The other permissible inference is that decedent was straining to see up the track. And, supporting that inference, we have the Affidavit of William Berg, eminently qualified, who sets forth his calculations that Plaintiff, in his normal seated position at the crossing could see only 45 to 60 feet down the track, but if he leaned forward, he could see a maximum of 114 feet down the crossing. This, too, is an inference, but an inference by a qualified expert based on the facts available to him, and his own calculations and measurements.

What inferences may be drawn from a certain set of facts is a fact question, for the jury to decide. The Court of Appeals in *Schreiner v. American Casualty Co.*, 1 Mich App 43; 134 NW2d 383(1965) quoted with approval the following from 22 MLP, Trial, Section 137, p. 312

> "A jury may draw reasonable and legitimate inferences and conclusions from established facts, and jurors are the judges of the legitimate inferences to be drawn from the testimony.
>
> "A jury question is presented where conflicting inferences can be drawn from the

evidence, or where the evidence is such that reasonable minds may differ as to the inferences to be drawn from the evidence.

Thus, it is for the jury to determine what inferences may be drawn from Plaintiff's conduct in the final moments of his life, as it considers "all the facts and circumstances" surrounding this tragic accident.

Plaintiff attaches a series of photographs taken by its claim agent, Weldon Geiger. Geiger's affidavit, which is attached to Defendant's Brief, as exhibit H, states the photos were taken from within 15 to 19 feet of the nearest rail. The Affidavit is missing a page, but the first seven photos, and the only ones attested to, were taken from 1300 feet down to 800 feet and are irrelevant because Plaintiff's view of the crossing is blocked in the approach as illustrated by Defendant's own investigator's photograph No. 3, taken 368 feet north of the crossing. See Exhibit 8 hereto. Similarly Photos Nos. 41 and 42 from the Defendant's investigative file shows the view from a similar truck cab and we see the basis for Professor Berg's opinion that Corl, in his normal seated position in the Hoppes truck, could see up the track only 45 to 60 feet. See para. 8 of Berg Affidavit, Ex. 3 hereto, and that leaning to the right would have increased decedent's view up track to 114 feet. See Ex. 8 hereto.

Inexplicably, Weldon Geiger does not tell us at what height the photos were taken, or whether they were taken from a vehicle or on foot. Further, with the missing page from the exhibit, his attestation goes only to the first six photos. Further, we have no evidence of his expertise, if he purports to any.

Arrayed against him is the opinion of one of America's preeminent rail crossing experts who has examined the crossing and all relevant data and testimony, and made his own measurements and calculations. See Ex. 3 appended hereto. In his opinion, the crossing was "unduly hazardous due to sight obstructions created both by foliage and the severe angle of the

intersection…" He stated the cause of the action to be "..the severe angle of the crossing, the position of the train as it approached the crossing, and the configuration of the 1995 Ford truck, the train was not visible to Brad Corl while he was stopped at the stop line located north of the grade crossing. Further, as Mr. Corl proceded south from the stop line, the train would not have become visible to him until about one second prior to impact. This afforded Mr. Corl no reasonable time for successful evasive action." Ex. 3.

There is a factual dispute as to what the decedent was doing just prior to his death, i.e. whether he was searching for something on the floor of his vehicle or whether he was turning in his seat in an attempt to look up the track. The testimony from the available witnesses is problematic.

The testimony of Russell Page, the engineer, who testified that he saw decedent "bent over, like he was getting something off the floor…" is inherently incredible, given the distance Page was from the decedent's vehicle and the towering height of the engine. See Ex. 2, p. 14 Dep. of Russell Page.

Q All right. Now what makes you think the fellow was bending over to pick something up?
A I---I seen him laying, like he was reaching, laying down getting something off the floor or something, like something fell or maybe---I don't know what he was doing, but he was ---he was leaning over to the passenger side of the vehicle.
Q So you could see through the truck windows, you could see him, what laying over to the right side of the seat?
A Yes.
Q Like he's trying to look down the tracks?
A. No. He was laying down across the seat like he was picking something up off the floor or something. I'm not for sure if he was picking something off the floor or what he was doing, but he was laying towards that way.
Q And you're at this point several hundred feet away from him?
A Maybe a hundred feet, maybe.
Q And you could see through the truck window, and you could clearly see him reaching to his right?
A Yes.

We have seen that defendants resisted discovery of the crew interviews conducted by Defendant's investigator in the immediate wake of the accident and coughed them up only after the Court's June 7, 2013 Order compelling. Attached as Ex. 5 hereto are the notes of Venturino's interview with Page and there is no mention of Page witnessing the decedent bending over to the right as if to pick something up.

Matt Denome, the conductor, testified that he spoke with Willis Johnson and his wife, Loretta, at the scene and that he remembered Willis Johnson saying that decedent "was bending down to pick something up," Ex. 6, Depos. of Matt Denome, p. 15. Denome incorporated this detail in the Company report, "But witness headed northbound said he was trying to pick something up on floor." Ex. 7. One would have to assume that Page would have mentioned this detail when first interviewed by the company claim investigator; his failure to do so indicates he adopted the observation as his own when Denome was questioning the Johnsons at the scene.

Willis Johnson, the driver who was stopped at the other side of the crossing, was not deposed. His affidavit, submitted as an exhibit in Defendant's brief with the Court of Appeals states, "After coming to a complete stop, the driver leaned over in the seat as if to pick something from the floor of the truck. His head was below the dashboard and not visible to me." Mr. Willis is drawing an inference, i.e. "as if to pick something from the floor of the truck." Because he could not see the decedent's head, he could not testify as to whether decedent in his last moments was desperately attempting to look down the track toward the approaching train.

Thus, there is a central disputed question of fact as to what decedent was doing in the final moments of his life. The inference is for the jury to make, in light of "all the facts and circumstances" surrounding this tragic accident.

D. Summary.

Leave to appeal should be denied. The Court of Appeals did not overrule Paddock, simply distinguished it. Further, the physical facts of the accident are in dispute rendering Defendant's reliance of the so-called "physical facts rule," inappropriate. Plaintiff's widow should be permitted to present her case to the jury. Defendant's attempts to erase the common law duty owed to the citizens of Michigan by the state's railroads to maintain safe crossings, free from visual obstruction, should be vain attempts. These specious arguments should no longer delay justice for an aggrieved widow and her fatherless children.

Respectfully submitted,

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